to hospital. While still on his way he was approached by a policeman who arrested him and who by reason of language difficulties was unable to understand his story to the effect that he had a pain in the stomach, a story which I should have thought could have been conveyed in spite of any language difficulties by means of gestures.

That story, it has been argued, constituted some sort of defence. Now, I have no intention of taking this case too far. I have no intention of attempting to answer the question whether the general exceptions under the Penal Code are available in prosecutions of this nature. My personal view is that they are but I am not prepared to state that as a firm view without hearing argument and I do not think it arises in this case. Nor am I concerned with the hypothetical case of a man subject to a Minister's order of this sort who finds his house on fire or finds himself in the throes of some sudden agony and leaves his house to seek relief. These questions will have to be dealt with if and when they arise.

Here, however, no such issue arises on the evidence even if it be stretched to the utmost in favour of the appellant and in view of the very clear wording of the section the appeal against conviction must therefore be dismissed.

As regards sentence, we have here a minimum sentence and of course all these minimum sentence provisions are highly objectionable not so much because they deprive the Court of the discretion which it should have in dealing with offenders but because they constitute a constant temptation to Judges and Magistrates to evade the wording of the law.

My own view, following the view of Wilson J. in the case of *Public Prosecutor* v. *Lee Lam*[1], is that in a proper case even where there is a minimum sentence provision an offender may be put on probation. But before it can be considered whether a case should be dealt with under section 173A or section 294 of the Criminal Procedure Code it is necessary to inquire whether it falls fairly and squarely within the terms of the section in question.

In my view the present case does not fall within the scope of either section and the appeal against sentence must therefore be dismissed.

Appeal dismissed.

HO GIOK CHAY v. NIK AISHAH

[O. C. J. (Hepworth J.) November 10, 1960]

[Kota Bharu — Originating Summons No: 71 of 1959]

Land Laws — Malay Reservation land — Charge over such land in favour of non-Malay — Validity of — Kelantan Land Enactment, No. 26 of 1938 — Kelantan Malay Reservations Enactment, No. 18 of 1930 — Malay Reservations (Amendment) Ordinance, No. 25 of 1954 (F.M.).

The applicant, who claimed to be a "native of Kelantan" within the meaning of the definition section (section 2) of the Land Enactment, but not a Malay, obtained 3 charges in succession from the respondent, a Malay, over her land, which was Malay Reservation land, to secure repayment of certain loans made to her. The charges were duly registered under the provisions of the Land Enactment. The respondent having defaulted in payment of principal moneys and interest secured by the 3 charges the applicant took out a summons to shew cause why the land should not be sold for realisation of the debts and for an order for sale. The respondent contended that the charges were null and void as being contrary to the Malay Reservations Enactment.

Held: (1) section 7(i) of the Malay Reservations Enactment precludes a non-Malay from acquiring any right or interest in reservation land (other than leases for limited periods) by transfer or transmission nor can any such right or interest be vested in a non-Malay;

(2) the power given to a chargee under section 136 of the Land Enactment to compel sale of charged land creates a right to or interest in the land in favour of the chargee; the word 'transfer' has a wide meaning and comprehends a transfer by way of assignment, security or otherwise; and, therefore, a charge under the Land Enactment transfers or vests a right or interest to or in the land in the chargee; otherwise a charge would be valueless and of no effect, the essential element being that the chargee is entitled to reimburse himself out of the land, that is to compel payment of the amount due by sale of the land itself;

(3) section 9A(i) of the Malay Reservations Enactment incorporated by Federal Ordinance No. 25 of 1954 lifts the prohibition against charging reservation land in favour of some defined persons who are non-Malays, the object of the amendment being to remove the absolute fetter created by section 7(i);

(4) the applicant not being within the exempting provisions of section 9A, the charges are null and void under section 12(i) of the Malay Reservations Enactment.

Semble: the power reserved to a chargee by section 127(i) of the Land Enactment to enter upon the charged land to view and inspect the state of repair of buildings and improvements thereon is indicative of a right or interest in land within the meaning of section 7(i) of the Malay Reservations Enactment.

Cases referred to:—

(1) *Gathercole* v. *Smith* 17 Ch. D. 1.
(2) *In re Combined Weighing Co.* 43 Ch. D. 99.
(3) *Re Lord's Settlement* [1948] L.J.R. 207; [1947] 2 All E.R. 685.
(4) *Coverdale* v. *Charlton* 48 L.J. Q.B. 132.
(5) *Gan Khor* v. *Soan bin Pelita* [1935] M.L.J. 158; [1935] F.M.S.L.R. 39.
(6) *Attree* v. *Hawe* (1878) 9 Ch. D. 337.
(7) *Re Harris* (1880) 15 Ch. D. 561.
(8) *Jervis* v. *Lawrence* (1883) 22 Ch. D. 202.

SUMMONS.

Lee Saik Kee for the applicant.

S. A. Lingam for the respondent.

Hepworth J.: The respondent is the registered proprietor of the land held under Grant No. 1 for Lot No. 21 section 3 Kota Bharu Town in the State of Kelantan together with the dwelling houses erected thereon and known as Nos. 1745 and 1746. This land is situated within a Malay Reservation and the respondent is a Malay.

On the 28th April, 1955, the respondent purported to execute a Memorandum of Charge for $3,000 over the said land in favour of the applicant Ho Giok Chay who resides at Jalan Sultanah Zainab, Kota Bharu in the State of Kelantan. Again on the 8th August, 1955, the respondent purported to execute a second Memorandum of Charge for $4,500 over the said land in favour of the applicant. And again on

the 19th May, 1956, the respondent purported to execute a third Memorandum of Charge for $2,300 over the said land in favour of the applicant.

In accordance with the provisions of subsection (i) of section 123 these memoranda were presented, becoming Presentations Nos. 402/55, 705/55, and 508/56 respectively, and were registered under Part 6 of the Kelantan Land Enactment, 1938 (which I shall hereinafter refer to as the Land Enactment). The applicant states she is a "native of Kelantan" within the meaning of the Land Enactment, although there is no evidence to this effect. In my view however this is of no importance because, for reasons stated later in this judgment, I do not think it matters whether she is or not.

None of the sums secured by the above charges having been paid and default therefore having been made in the payment of the principal sums secured by the charges, the applicant has by Summons called the proprietor of the charged land, the respondent, to show cause why the land subject to the charges should not be sold by public auction under the direction of the Court under section 136 of the Land Enactment.

The respondent, after making a variety of allegations as to the transactions which resulted in these charges being entered into, has now abandoned all the grounds but one upon which she contested the applicant's right to enforce the charges and relies simply on the one ground that the three charges are unenforceable by virtue of the provisions of the Kelantan Malay Reservations Enactment, 1930 (which I shall hereinafter refer to as the Reservations Enactment) because the applicant is not a Malay within the meaning of this Enactment. It is common ground that the land is within a Malay Reservation.

Before considering the Reservations Enactment and the submissions of counsel in relation thereto it will, I think, be helpful to keep in mind certain of the provisions of the Land Enactment.

The effect of the registration of any instrument is set out in section 85, which reads as follows:—

"85. No instrument until registered in manner hereinbefore prescribed shall be effectual to pass any land or any interest therein or render any land liable as security for the payment of money; but upon the registration of any instrument in manner hereinbefore prescribed the land or interest specified shall pass or, as the case may be, the land shall become liable as security in manner and subject to the agreements, conditions and contingencies set forth and specified in such instrument or by this Enactment declared to be implied in instruments of a like nature."

The right of a proprietor to transfer or charge or lease his land is contained in section 41, which reads as follows:—

"41. Subject to the provisions of section 37A and in the absence of any restriction in that behalf of his interest set forth in his document of title or imposed by law, a proprietor shall have the right to transfer or charge or lease his land to any such individual person, company or body corporate as is in section 9 mentioned, but so that no lease executed after the coming into force of this Enactment shall be for a longer period than thirty years."

The individual person, company or body corporate are referred to in section 9 as follows:—

"9. State land may be alienated only to

(a) an individual person, not being a minor, or

(b) a company authorised by its constitution to hold land and duly registered under the Foreign Companies Enactment or incorporated under any Enactment which may be passed regulating Companies in Kelantan, or

(c) a body corporate authorised to hold land incorporated by any law in force for the time being or constituted by Royal Charter of Letters of Patent of His Britannic Majesty, or

(d) a duly constituted representative under a certificate of representation:

Provided that no land may be alienated to any person who is not a native of Kelantan without the sanction of His Highness the Sultan in Council."

A "native of Kelantan" is defined in section 2 as follows:—

'"native of Kelantan" means a person who falls within any of the following classes:—

(a) any person born in Kelantan whose father was a Malay;

(b) any person born in Kelantan whose mother was a Malay and whose father was a Muslim;

(c) any person wherever born whose father was a Malay born in Kelantan;

(d) any person wherever born both of whose parents were Malays and who has resided at least 15 years in Kelantan;

(e) any person who was born in Kelantan and whose father was also born in Kelantan.'

It will be seen that the proviso to section 9 refers only to alienation. The definition of "alienate" in section 2 makes it clear that the proviso only refers to selling, leasing or otherwise disposing of State land. This being the case a proprietor of land can under section 41 charge that land to the individual persons, companies, bodies corporate or duly constituted representatives specified in section 9 and the individual persons do not have to be natives of Kelantan. In so far as the Land Enactment is concerned, therefore, and only in so far as that Enactment is concerned, there would not appear to be anything objectionable in the charges.

Under the Reservations Enactment restrictions on the transfers of interests in reservation land are contained in sub-section (i) of section 7 which reads as follows:

"7. (i) No right or interest of any Malay in reservation land and no right or interest in such land acquired by virtue of section 13A by any person not being a Malay shall be transferred to or transmitted to or vest in any person not being a Malay provided that leases of reservation land shall be valid to the extent specified in subsections (ii) to (v) below, save as provided in this Enactment."

We are not here concerned with section 13A, and that part of the section which has reference to section 13A was added only in 1949 and is not relevant to the case under consideration.

For the purposes of the Reservations Enactment the word "Malay" has the meaning stated in section 3 of that Enactment which is as follows:—

'"Malay" means a person belonging to any Malayan race who speaks any Malayan language and professes the Mohammedan religion; and shall include (a) the Majlis

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Ugama Islam (b) the Official Administrator when acting as administrator or trustee of the estate of a deceased Malay.'

It is common ground that the applicant is not a Malay within this definition and that the respondent is.

Mr. Lingam on behalf of the respondent submits that by virtue of section 7 the respondent had no power to charge the said land to anyone not being a Malay. He says that the charges purported to transfer or vest a right or interest of a Malay, the respondent, in reservation land in a person not being a Malay, the applicant. He gives no reasons in support of his submission except to say that the amendment of the Reservations Enactment by the addition of a new section 9A by the Malay Reservations (Amendment) Ordinance, 1954, would have been unnecessary unless this was so.

Mr. Lee on behalf of the applicant argues that had it been the intention of the Reservations Enactment to restrict the persons to whom land in a Malay Reservation could be charged it would have said so in terms. That is to say that subsection (i) of section 7 would have contained the words "charged to" in addition to the words "transferred to or transmitted to or vest in" The very absence of any such restriction he argues makes it clear that, as under the Kedah Malay Reservations Enactment, property can be charged to non-Malays, and the restriction is simply that, when enforcing the charge by sale, the land can only be sold to a Malay. He quoted no authorities in support of his arguments.

I do not think that there is any difficulty over the words "transfer" and "vest". We are not concerned here with transmissions which are dealt with in Part II of the Land Enactment and relate to death or disability. The operative word "transfer" is one of the widest terms that can be used (*per* James L.J. in *Gathercole* v. *Smith*[1]). Transfer (for example of a debt) does not necessarily mean absolute transfer but may be a transfer by way of assignment, security or otherwise (*per* Cotton L.J. in *In re Combined Weighing Co.*[2]). "Vest", in the absence of a context, is usually taken to mean vest in interest rather than vest in possession (*per* Romer J. in *Re Lord's Settlement*[3]). See also observations of Brett L.J. in *Coverdale* v. *Charlton*[4].

I do not think that there can be any doubt that a charge under the Land Enactment transfers or vests a right or interest in something to or in the chargee. If it did not a charge would be valueless and of no effect. But the question with which we are concerned is not whether a charge transfers or vests a right or interest to or in the chargee but whether that right or interest is a right or interest in land.

In *Gan Khor* v. *Soan bin Pelita*[5] Sir Samuel Thomas C.J. stated:—

"It must be remembered that a charge is a very different transaction to a mortgage. There is no such thing as a mortgage of land known to the law of the Federated Malay States. Charges alone are recognised. The rights arising from a charge are contained in the Land Code. It is not possible to seek to introduce the elements of an English mortgage into a charge as provided by the law of the Federated Malay States, and therefore apart from any express powers it is not correct to say that a chargee has the right to enter into occupation. Were it otherwise, there would undoubtedly be such an interest in land that it would be unquestionable that the charge itself was invalid under section 8 of the Malay Reservations Enactment, 1913."

With these observations I respectively agree. They are equally applicable to the equivalent Enactments of Kelantan. A mortgage in England is entirely different from a charge in Kelantan and there is no question whatever that a mortgage transfers an interest in land to the mortgagee. Regrettably the learned Chief Judge found it unnecessary in that case to decide whether the charge was or was not valid under the F.M.S. Malay Reservations Enactment, 1913.

Such rights and interests as arise from a charge in Kelantan can only be such as are contained in and given by the Land Enactment. Nonetheless English decisions relating to various things other than mortgages, such as debenture stock, charges on police rates and assignments by way of mortgage of a proportion of improvement rates, showing the circumstances in which such do not create rights or interests in land, do in my view give considerable assistance in reaching a conclusion, because the judgments inevitably contains reference to the essential elements which are missing. The essential elements the presence of which are necessary before it can properly be said that a right or interest in land has been created.

These English cases arose as a result of the Mortmain Act, and for the better understanding of the cases to which I am going to refer it would be as well to mention briefly the reasons for that Act. In his judgment in *Attree* v. *Hawe*[6] James L.J. sets out the reasons for the enactment of the Mortmain Act. It had from the earliest times, he said, been the policy of the common law as interpreted by the Judges to discourage the inalienability of land, and this altogether irrespective of the peculiar mischiefs supposed to arise from the vesting of lands in mortmain, which deprived the Sovereign and the lords of the profitable incidents of feudal tenures. And this policy in more modern times approved itself to the Legislature. It was deemed in itself a mischief that lands should be rendered inalienable, and the Legislature found that this mischief was being mischievously increased in one particular way — that is to say, it was found that dying persons were, sometimes from spontaneous weakness, and sometimes from their readiness to yield to the many influences which can be brought to bear on person *in extremis*, too easily minded to give lands to charitable uses (words of the widest signification), and to be posthumously benevolent at the expense of their lawful heirs. And this was the mischief, and the sole mischief, which the Legislature set itself to prevent, *viz.*, to prevent the increase of inalienable land through the weakness of or practices upon dying persons, or through posthumous charity. The learned Lord Justice went on to say

that in the Act there is no prohibition of gifts of land by deeds *inter vivos*, but there are regulations securing that such gifts shall not be in substance posthumous merely by avoiding the form. There is no prohibition of any amount of testamentary charity confined to pure personal property. But the Act does in the most comprehensive terms forbid any such testamentary or posthumous charity as to any interest in land or other real estate, or as to any charge or incumbrance affecting the same.

Arising out of this, therefore, there were a number of decisions as to whether in the particular circumstances of the particular case a right or interest in land had or had not been created and accordingly whether or not the Mortmain Act applied.

In *Attree* v. *Hawe, supra,* in which it was held that debenture stock created under the provisions of the Companies Clauses Act, 1863, did not give the holder an interest in land within the meaning of the Mortmain Act, James L.J. in the course of delivering the judgment of the Court of Appeal said at the close of his judgment in reference to the Companies Clauses Act, 1863:—

"By the 31st section it is, no doubt, provided that, in all respects not otherwise by or under the Act or the special Act provided for, debenture stock shall be considered as entitling the holders to the rights and powers of mortgagees of the undertaking, other than the right to require the repayment of the principal money. But what are the rights and powers of mortgagees of the undertaking consistent with the powers conferred by the special Act on the railway directors? They are not powers to take the land or enter on the land, or in any way to interfere with the ownership, possession, or dominion of the statutory owners and managers.

The result is that the debenture stock is a charge on the net profits and earnings of a trading corporation, and is no more land, tenement, or hereditament, or any interest in land, tenement, or hereditament, or charge or incumbrance affecting land, tenement, or hereditament, than the share stock in such corporation is, or a bond or other debt due from a man who has got real property is."

In *Re Harris*[7], a case in which a charge, by a bond or instrument of charge, upon the police rates, was held to be pure personalty, Jessel M.R. referred with approval to the decision in *Attree* v. *Hawe* and epitomised that judgment as deciding "that, in order to create an interest in land the land must be affected directly".

In *Jervis* v. *Lawrence*[8], in which it was held that an assignment by way of mortgage of a proportion of the rates arising under the Improvement Act did not create an interest in land, Bacon V.C. during the course of his judgment in which he quoted *Attree* v. *Hawe* with approval said:

"Is this a charge or incumbrance affecting the land? The right to levy for rates is conferred by an Act of Parliament which, applying itself to a district where building was going on for the first time, recognises the necessity of providing roads and squares, and so forth, things which ought to be done to make the land more valuable for owners of it whoever they may be. In return for that, or rather as compensation for the expenditure which would be incurred on that land, authority is given to levy a rate upon the occupiers or owners — upon the occupier first and upon the owner, if there is no occupier, of the land, for the purpose, and for the purpose only, of re-imbursing that expenditure by which the value of the property is to be increased.

Now what are the means of enforcing that contribution in the shape of rates? It may be enforced either by bringing an action against an owner or occupier who refuses or neglects to pay, or by issuing a distress warrant to levy upon his goods and chattels for the amount demanded. How does that affect the land? Not in any degree. The land cannot be sold by the incumbrancers, if the Commissioners can be called incumbrancers, and they cannot affect it or touch it. The land remains as it was — easily alienable by the owner, and not affected in any degree. Even if I were satisfied (and I am not) that the imposition of this rate diminished the value of the land, that would not affect the case.

The policy of the law being plain on the Mortmain Act of George II, and the matter in substance being, that the Commissioners who made a rate had a right to compel payment of it by distress on the goods and chattels of the owner, I ask again where is there an interest in the land? It is impossible that it can be said, and nobody can suggest that the land is burdened, or even if it is burdened, that the persons who claim the benefit have a right to touch the land."

It will be seen that the one essential element lacking in all these cases was a right on the part of the person I will call, for lack of a better word, the "chargee" to reimburse himself out of the land, that is to compel payment of the amount due by sale of the land itself.

Now what rights and interests arising from a charge are contained in and given by the Land Enactment?

Charges are dealt with in Part 10 of the Land Enactment. As I have already said section 123 deals with the form and execution and presentation of the charge. Sub-section (i) of section 127 provides that in every charge there shall be implied agreement by the chargor that he will repair and keep in repair all buildings or other improvements erected or made upon the land and that the chargee may at all reasonable times enter upon such land to view and inspect the state of repair of such buildings or improvements. This implied agreement may not be conclusive by itself but why should the chargee be given a right to enter and inspect the repair of buildings or improvements on the land if he has no right or interest in that land? If he has no right or interest in that land it would be pointless for him to enter and inspect as provided in section 127(i).

But the really conclusive provisions of the Land Code which supply the most essential element which was lacking in the English cases to which I have referred are the provisions of section 136 which prescribe the action available to a chargee if default is made in the payment of the principal sum, interest, or periodical payments or any parts thereof. By section 136 if such default is made the chargee is at liberty to issue a summons to call the proprietor of the charged land before the Court to show cause why the land subject to the charge should not be sold by public auction under the direction of the Court, and if no cause is shown to the satisfaction of the Court it shall order the public sale of the land. The section, it will be seen, is mandatory. If no cause is shown the Court must order the public sale of the land. In addition be it noted that under section 139 the chargee may, subject to any disability created by the Land Enactment or any other Enactment, bid at such sale and buy the

land for himself. The vitally important thing to my mind is that the chargee is in those circumstances entitled to compel the sale of the land. It is difficult to see what the power given to the chargee by section 136 can be unless it be a right or interest in land.

I am reinforced in this view by the terms of section 85 of the Land Enactment to which I have already referred in which the words used are ". . . . . upon the registration of any instrument . . . . . the land shall become liable as security . . . . ." Upon the registration of a charge the land shall become liable as security. Does this not create a right or interest in that land? Can it be said as a result that a right or interest in that land is not transferred or vested in the chargee by a memorandum of charge?

Again by the Malay Reservations (Amendment) Ordinance, 1954, the power to charge given by the Land Enactment was extended to certain persons and bodies who were specified in a new Schedule 26A. When this Ordinance was in Bill form the Bill referred only to the Land Enactment and made no reference to the Reservations Enactment. However, when the Bill was enacted a new section 9A had been added to the Reservations Enactment together with a new Schedule D. The new sub-section (1) of section 9A reads as follows:

"9A. (1) Notwithstanding anything hereinbefore contained the proprietor of any reservation land may charge such land or any part thereof to any person specified in Schedule D, and may in favour of any such person create, subject to the provisions of section 128 of the Land Enactment a lien by deposit of the issue document of title for such land."

If Mr. Lee's contention is correct this new section 9A and the new Schedule D would, so far as the Reservations Enactment is concerned, as Mr. Lingam says have been completely redundant. I think, however that it was necessary because without it there was a total prohibition against charging land contained in a Malay Reservation except within the limitations prescribed by section 7.

In my opinion, therefore, the charges with which we are concerned constitute a breach of the provisions of sub-section (i) of section 7 of the Reservations Enactment. That being so, by virtue of the provisions of sub-section (i) of section 12 of that Enactment these charges are null and void.

In these circumstances the respondent has shown cause why the land subject to the charges should not be sold by public auction and the Summons is accordingly dismissed with costs.

Summons dismissed.

Solicitors: *Pillai, Lim, Lee & Hwang; S. A. Lingam.*

TOH LAI HENG v. REGINA

[C. C. A. (Rose C.J., Chua & Wee Chong Jin JJ.) November 11, 1960]

[Singapore — Criminal Appeal No. 32 of 1960]

Criminal procedure — Murder trial — Evidence — Dying declaration — Admissibility in evidence — Declaration reduced to writing — Importance of recording actual words where conversation not in mother tongue of either.

A dying declaration need not be proved by writing at all; there are many cases where eye-witnesses at the scene of an attack, or persons arriving shortly thereafter, may hear the last words spoken by a dying man and their recollection of those words will properly be received in evidence. In practice such a witness would be required to give the exact words spoken by the deceased and, in so far as they are relevant, any words spoken to the deceased by the witness himself.

If the dying declaration is reduced to writing, particularly by an investigating Police Officer, Magistrate, or someone of that kind, the actual words of the deceased must be recorded.

In this case the prosecution witness who was called to prove the relevant deposition testified that he reduced into writing briefly the substance of the dying declaration. The deceased and the witness conversed in Malay, which was not the mother tongue of either, and the conversation was recorded in English.

Held: the omission to record the actual words of the deceased was a fatal defect.

Cases referred to:—

(1) *R.* v. *Mitchell* (1892) 17 Cox C.C. 503.

(2) *R.* v. *Bottomley* (1903) 38 L.J. Newsp. 311.

COURT OF CRIMINAL APPEAL.

T. T. Rajah for the appellant.

A. W. Ghows (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Rose, C.J. (delivering the judgment of the Court): The principal point raised in this appeal is that the dying declaration was improperly admitted in evidence.

At page 50 of the record it appears that the learned trial Judge himself put the following question to Inspector Chan Kok Guan, who was the witness called to prove the relevant deposition:—

Q. You really wrote down what he told you just what you told us?

A. No, I put down briefly what he told me.

It would seem to be clear that the meaning of the learned trial Judge's question was "Have you recorded the actual words spoken by the deceased?"

Learned counsel for the defence repeated the same question in a slightly different form, and received the confirmation of the witness.

It is no doubt true that a dying declaration need not be proved by writing at all; and there